STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS-AMERICAN WATER COMPANY	)	
	)	Docket No. 11-0767
Proposed general increase in water and sewer rates.	)	

ILLINOIS-AMERICAN WATER COMPANY'S
MOTION TO STRIKE PORTIONS OF THE TESTIMONY OF RALPH C. SMITH

Pursuant to 83 Ill. Adm. Code Sections 200.190 and 200.680, Illinois-American Water Company ("IAWC" or the "Company") moves to strike certain portions of the direct and rebuttal testimony and exhibits of Ralph C. Smith, submitted by the People of the State of Illinois, through the Office of the Attorney General, (the "AG") in this proceeding. This testimony contains discussions of and excerpts from a variety of proceedings from jurisdictions other than Illinois. Because the comparability of the circumstances and regulatory framework of those proceedings to IAWC and Illinois has not been (and cannot be) established, the testimony is irrelevant. Further, Mr. Smith, in so discussing the extra-jurisdictional proceedings, is improperly offering the legal opinions of an attorney as testimony and is attempting to introduce into the record inadmissible hearsay. Therefore, the following testimony should be stricken[1]:

- AG Ex. 2.0 CONFIDENTIAL, p. 27, ll. 589-595 (PUBLIC, p. 27, ll. 589-95);
- AG Ex. 2.0 CONFIDENTIAL, pp. 35-37, ll. 859-905 (PUBLIC, pp. 35-37, ll. 858-904);
- AG Ex. 2.0 CONFIDENTIAL, p. 52, ll. 1240-1243 (PUBLIC, p. 51, ll. 1232-1235);
- AG Ex. 2.0 CONFIDENTIAL, pp. 53-54, ll. 1264-1283 (PUBLIC, p. 52-53, ll. 1256-1275);

[1] The public and confidential versions of AG Exhibit 2.0 (Smith Dir.) contain different paginations. For ease of reference, IAWC has identified the pertinent page and line numbers in both versions. In addition, IAWC has provided annotated copies of both the public and confidential versions of AG Exhibit 2.0 as Appendices A and B, respectively. An annotated copy of AG Ex. 4.0 (Smith Reb.) is attached as Appendix C.

- AG Ex. 2.0 CONFIDENTIAL, pp. 93-95, ll. 2133-2179 (PUBLIC, pp. 93-95, ll. 2125-2171);
- AG Ex. 2.3, pp. 39-47;
- AG Ex. 4.0, pp. 10-11, ll. 207-236;
- AG Ex. 4.0, pp. 20-23, ll. 454-527;
- AG Ex. 4.0, pp. 27-29, ll. 622-625, ll. 628-669;
- AG. Ex. 4.0, p. 43, ll. 966-978;
- AG Ex. 4.0, p. 44, ll. 987-991; and
- AG Ex. 4.0, p. 47, ll. 1051-1059.

I. INTRODUCTION

On March 7, 2012 and April 26, 2012, pursuant to the approved case schedule, the AG filed the direct and rebuttal testimony of Ralph C. Smith, a Certified Public Accountant ("CPA") and licensed attorney in Michigan. Mr. Smith purports to have "reviewed and analyzed data and performed other procedures as necessary (1) to obtain an understanding of *the Illinois-American Water Company rate filing package* as it relates to *the Company's proposed rate increases* for water and sewer utility service and (2) to formulate an opinion concerning the reasonableness of *these Company-proposed rates*." (AG Ex. 2.0 CONFIDENTIAL/PUBLIC, p. 5, ll. 96-100 (emphasis added).) Yet, substantial portions of his testimony are about *other* proposed rate increases of *other* utilities in *other* jurisdictions. In addressing these extra-jurisdictional proceedings, Mr. Smith fails to establish their comparability to the instant one. Nor can he. Put simply, testimony about proceedings relating to different utilities, involving different facts and governed by different public utility commissions subject to different regulatory environments is not relevant to IAWC's rate case here.

Even more egregious, in testifying to, and relying on, these irrelevant and extraneous

matters, Mr. Smith makes no distinction between *pending* proceedings and final ones or settled matters and contested ones, references a *proposed* order not yet subjected to final commission review, generically references testimony, discovery responses and briefs submitted by parties to these other proceedings, and, without fail, refers to each and every extra-jurisdictional matter out of context, simply "cherry picking" the portions he finds self-serving and ignoring the rest. He thereby robs the Commission, its Staff and the parties to this proceeding the benefit of the "whole picture" regarding the other proceedings. This practice cannot be condoned. The Commission should recognize the offending portions of Mr. Smith's testimony for what they are—irrelevant and improper—and strike them from the record in this case.

In addition to being irrelevant, the extraneous documents on which Mr. Smith's testimony relies constitute inadmissible hearsay. For instance, Mr. Smith testifies regarding, and quotes a selective excerpt from, the direct testimony of a party witness in a California proceeding. That California witness is not available for questioning here. Mr. Smith also testifies regarding, and attaches to his direct testimony select excerpts from, discovery responses submitted by a utility in a Pennsylvania proceeding. Again, the unidentified Pennsylvania witnesses responding to those data requests are not available for questioning here. Apart from their dubious applicability to the instant proceeding, such selective portions of testimony and discovery from *other* proceedings related to *other* utilities in *other* jurisdictions are without foundation, are incomplete and out of context, and represent inadmissible hearsay. They should be stricken from the evidentiary record.

II. ARGUMENT

A. The Portions of Mr. Smith's Testimony Related to Extra-jurisdictional Proceedings Are Irrelevant and Should Be Stricken.

The Illinois Administrative Procedure Act (the "APA") mandates "in contested cases irrelevant . . . evidence *shall* be excluded." 5 ILCS 100/10-40(a) (emphasis added). The Commission's rules and the Illinois Rules of Evidence (which apply to Commission proceedings) reiterate that prohibition. *See* 83 Ill. Adm. Code 200.610(a) ("In all proceedings subject to this Part, irrelevant, immaterial or unduly repetitious evidence shall be excluded."); 83 Ill. Adm. Code 200.610(c); Ill. R. Evid. 402 ("Evidence which is not relevant is not admissible."); 83 Ill. Adm. Code 200.680 (permitting the Hearing Examiner to exclude irrelevant evidence). Relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401. In other words, it is evidence "[l]ogically connected and tending to prove or disprove a matter in issue." Black's Law Dictionary, p. 1404 (9th ed. 2009).

It follows then, in order for evidence relating to proceedings outside Illinois and before tribunals other than the Commission to be deemed relevant, a similarity of conditions must be shown before such comparison can have probative value. *Moline Consumer's Co. v. Ill. Commerce Comm'n*, 353 Ill. 119, 126 (Ill. 1933); *Antioch Milling Co. v. Pub. Serv. Co. of N. Ill.*, 4 Ill. 2d 200, 210 (Ill. 1954) (excluding evidence of differing rates where the party failed to demonstrate that the utilities being compared were sufficiently similar to warrant comparison). Absent such showing, there can be no relevance. Indeed, the Commission has recently cautioned "[it] is completely uninformed as to the decisions from . . . other jurisdictions where [it

has] no evidence that circumstances are comparable. ***Such comparisons are not relevant***." *North Shore Gas Co./Peoples Gas Light & Coke*, Docket Nos. 11-0280/0281 (cons.), Final Order, p. 137 (Jan. 10, 2012) (emphasis added).

Despite the Commission's caution, and the rules prohibiting the admission of irrelevant evidence, the direct and rebuttal testimony and exhibits of Mr. Smith are replete with comparisons of proceedings from other jurisdictions to the instant Illinois one. Mr. Smith relies on those (unsupported) comparisons to summarily conclude, because an adjustment allegedly is appropriate in another state, it is therefore appropriate under the facts and law governing this proceeding. In making those comparisons, Mr. Smith does not establish that the circumstances of these cases or the regulatory environments they were undertaken in are comparable to Illinois. He does not, for example, address whether these proceedings featured different test years, different evidence, different accounting rules or different ratemaking practice. He also does not limit his reliance to just "*decisions* from . . . other jurisdictions," *id*., his testimony relies on *excerpts* of *proposed* decisions, paraphrases testimony and briefing, and cites portions of data request responses. These materials do not consist of Mr. Smith's own observations and opinions; rather, much of what Mr. Smith has presented as his own testimony is nothing more than selective quotations or summaries taken from testimony, briefing and discovery responses prepared by third parties not before the Illinois Commission here. These excerpts are unsworn statements made outside the proceeding, which are now being offered for the truth of the matter asserted. Indeed, the only "final" extra-jurisdictional order he cites is what appears to be an excerpt from a nearly 20-year-old Pennsylvania Public Utilities Commission decision. (IAWC submits references to final orders are more appropriately made in briefing, not testimony.) The following identifies each such improper portion of Mr. Smith's testimony, and demonstrates its

impropriety:

- In **AG Ex. 2.0 CONFIDENTIAL, p. 27, ll. 589-595**, Mr. Smith testifies that "[c]oncern was raised" in a California-American Water Company ("CAWC") rate proceeding (the "California proceeding") regarding the capitalization of costs related to American Water Work's Business Transformation ("BT") program. He fails to note the California proceeding is *pending* or that the California commission has yet to issue a decision. He makes no effort to demonstrate the California proceeding is comparable to the instant Illinois one—he does not state whether the test year is the same, whether the applicable regulatory environment is in any way comparable, whether the underlying facts are the same or whether the proposals are the same. It is IAWC's understanding they are not.

- In **AG Ex. 2.0 CONFIDENTIAL, pp. 35-37, ll. 859-905**, Mr. Smith again testifies extensively regarding how BT costs are allegedly "being addressed" in the California proceeding and he both quotes and paraphrases self-serving *excerpts* of (what he claims are) the direct testimony of two utility witnesses (ll. 865-905). Mr. Smith fails to provide a complete copy of the testimony or even a citation to where it could be found in the California proceeding record. Further, there is no showing of comparability between the proceedings.

- In **AG Ex. 2.0 CONFIDENTIAL, p. 52, ll. 1240-1243**, Mr. Smith testifies "[a] similar adjustment to cash working capital [to that he is proposing in the IAWC rate case] has been made for *other* American Water Works utilities in *other* jurisdictions for ratemaking purposes . . . ." (emphasis added). He does not identify those alleged *other* utilities and *other* jurisdictions, let alone attempt a showing of comparability.

- In **AG Ex. 2.0 CONFIDENTIAL, pp. 53-54, ll. 1264-1283**, Mr. Smith again claims his proposed cash working capital adjustment is "routinely applied by IAWC's utility operating affiliates in *other* jurisdictions" (emphasis added). He testifies regarding the alleged practices of Pennsylvania-American Water Company ("PAWC"), referencing "notations" (l. 1272) made by that utility in discovery in its recent rate case (the "Pennsylvania proceeding") which Mr. Smith contends "clearly show" (l. 1269) that utility would agree with his proposed adjustment here. Mr. Smith even attaches excerpts of PAWC's responses to that discovery as an exhibit to his direct testimony. (AG Ex. 2.3, pp. 39-42.) He then cites, and again attaches as an exhibit to his testimony, an *excerpt* from a nearly 20-year-old Pennsylvania commission decision which he claims is further support for his position. (AG Ex. 2.3, pp. 43-47.) From this, he concludes the *Illinois* Commission should "consider the fact that the same *or similar* adjustment . . . is being made in *other* jurisdictions, including Pennsylvania, West Virginia, and *possibly others*, and to require the adjustment in the current case." (emphasis added). However, Mr. Smith neither equates the particulars of the Pennsylvania proceeding to the instant Illinois one, nor explains how the alleged adjustments in the unidentified *other* jurisdictions are "the same or similar" here. Inexplicability, he also fails to inform the Commission and the parties the Pennsylvania matter was *settled*.

- In **AG Exhibit 2.0 CONFIDENTIAL, pp. 93-95, ll. 2133-2179**, Mr. Smith testifies regarding the alleged ratemaking treatment of a certain tax deduction both in the California proceeding, and, even further afield, by Georgia Power Company. Like before, he refers not to final orders (which would nevertheless be irrelevant, absent a showing of comparability), but to the *testimony* of utility and consumer advocates in the California proceeding. Unlike before, however, rather than quoting or paraphrasing the California testimony, he generically describes it (as he apparently interprets it). He does not provide the testimony itself, identify the testifying witnesses or so much as a cite to where it can be found in the California proceeding record. Indeed, for another party to find the testimony Mr. Smith alleges exists, it would be forced to hunt for a needle in a haystack. As to Georgia Power Company, Mr. Smith testifies, without a single citation, that that utility's (phantom) computation of income tax expense should apply to IAWC here. Mr. Smith makes no showing of comparability of either the California proceeding or Georgia Power Company to this rate case and IAWC.

- In **AG Ex. 4.0, pp. 10-11, ll. 207-236**, Mr. Smith returns again to the pending California proceeding, this time including in his testimony an out-of-context excerpt from a *proposed* decision in that pending proceeding. He does not provide the decision in its entirety or explain how a proposed decision, not yet acted on by the California commission, has any bearing on Illinois. In any event, as before, he again fails to demonstrate the facts, circumstances and law underlying the California proceeding are comparable to those underlying this Illinois case.

- In **AG Exhibit 4.0, pp. 20-23, ll. 454-527**, Mr. Smith again returns to the Pennsylvania proceeding, testifying an adjustment agreed to by PAWC should be applied to IAWC because he believes PAWC "*apparently* has been making the same ratemaking adjustment for years . . ." (ll. 475-476 (emphasis added).) He then copies verbatim from his direct testimony his discussion of the PAWC discovery responses and the 20-year-old Pennsylvania commission order. He contends that commission's "virtually irrefutable logic" (ll. 501) should apply here, but provides no cites in support, no context, and no comparability.

- In **AG Ex. 4.0, pp. 27-28, ll. 622-625 and ll. 628-633**, Mr. Smith refers to the ratemaking treatment of certain tax deductions in California, West Virginia and other, unidentified "energy utilities." He does not and cannot show a comparability of circumstances.

- In **AG Ex. 4.0, pp. 28-29, ll. 645-669** and **AG. Ex. 4.0, p. 43, ll. 966-978**, Mr. Smith again testifies to the alleged "agreement" by CAWC to the ratemaking treatment of certain tax deductions. Yet this time, he refers to the *briefs* allegedly submitted by that utility in the pending California proceeding and alleged, unidentified generic calculations submitted by the utility and a consumer advocate party. (As before, he provides no citations or the actual text.) And, for the first time, here he attempts to compare Illinois to California, arguing, "[CAWC] is essentially in a *similar* position to IAWC" because both participate in a consolidated tax group. But that is as far as he gets. That testimony is not a sufficient demonstration of the comparability requisite to overcome the relevance hurdle Mr. Smith has created for himself.

- In **AG Exhibit 4.0, p. 44, ll. 987-991**, Mr. Smith again testifies to the alleged ratemaking treatment of a certain tax deduction in the California proceeding as well as unnamed "other utility rate cases." He offers no showing of comparability or the courtesy of a supporting citation.

- In **AG Exhibit 4.0, p. 47, ll. 1051-1059**, Mr. Smith testifies unspecified "adjustments" to reflect certain tax savings have been "made routinely," thus providing ratepayers with alleged unidentified "benefits," in Pennsylvania, New Jersey, West Virginia and Indiana. He provides no docket numbers, no citations, no specifics and no showing of comparability between Illinois and these states.

In sum, "[t]he Commission is under no obligation to consider the ratemaking practices employed in other jurisdictions." *North Shore Gas Co./Peoples Gas Light & Coke*, Docket No. 07-0241, Final Order (Feb. 5, 2008), p. 152. Nor should it. Absent a showing of comparability, they are not relevant and serve only to muddy the evidentiary record. Despite the claimed breadth of his experience, Mr. Smith blindly ignores that ratemaking is not a uniform process among all states. He makes no effort to demonstrate the circumstances of the extra-jurisdictional proceedings about which he testifies are the same as those at issue in the instant Illinois proceeding. He cannot. Put simply, they are not comparable and, as a result, are irrelevant.

Moreover, the portions of his testimony addressed above essentially speak to what Mr. Smith "feels the law should be" in Illinois—the same as the law in the extra-jurisdictional proceedings he discusses. Put simply, Mr. Smith summarily concludes, because one adjustment is appropriate in another state, it is appropriate under the law governing this proceeding. That is improper legal opinion testimony. *See Johnson v. Lynch*, 66 Ill. 2d 242, 246 (Ill. 1977); *Northern Morain Wastewater Reclamation Dist. v. Ill. Commerce Comm'n*, 392 Ill. App. 3d 542, 573-74 (2nd Dist. 2009) (holding the Commission did not abuse its discretion in barring expert testimony where it, *inter alia*, "testified to legal conclusions"). As such, the offending portions

of his testimony outlined above are improper as well as irrelevant. They should be stricken.

B. The Portions of Mr. Smith's Testimony Related to Extra-jurisdictional Proceedings Constitute Inadmissible Hearsay and Should Be Stricken.

Like irrelevant testimony, hearsay also is inadmissible. Ill. Evid. R. 802. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. Evid. R. 801(c). The rules against hearsay protect the record from unreliable evidence, the primary concern being the lack of opportunity to cross-examine the declarant and vet the evidence through the appropriate procedural channels. *See People v. Jura*, 352 Ill. App. 3d 1080, 1085 (1st Dist. 2004). Indeed, the Illinois Commerce Commission has explained, in striking testimony based on what other utilities in other jurisdictions were doing on the grounds the same contained substantial hearsay, "[w]hile an expert may give his opinion on facts that are not in evidence, the facts must be capable of being tested through cross-examination, and hearsay statements that an expert witness relies on *cannot themselves be admitted as evidence*." *Ill Commerce Comm'n on its Own Mtn.*, Docket No. 90-0038, 1990 Ill. PUC LEXIS 640, Order, *51 (Dec. 12, 1990) (emphasis added).

Notably for purposes of this motion, an out-of-court statement offered for the truth of the matter asserted remains hearsay "regardless of the form in which the content is offered—as an attachment . . . or as text in [written] testimony." *Aqua Illinois, Inc.*, Docket No. 04-0442, Final Order, pp. 43-44, n. 4 (Apr. 20, 2005). In other words, the fact that an out-of-court assertion is submitted via written testimony or in an exhibit does not alter its substance: it remains inadmissible hearsay. *Id.*, p. 44, n. 4.

All of the irrelevant testimony outlined above also constitutes impermissible hearsay. Mr. Smith has offered that testimony to prove circumstances in other jurisdictions are what he

says they are, and to encourage the Illinois Commission to take heed and apply similar reasoning in this State. Yet, the drafters of (the uncited *excerpts* of) the proposed decision, testimony and briefs in the *pending* California proceeding (AG Ex. 2.0 CONFIDENTIAL, p. 27, ll. 589-595, pp. 35-37, ll. 859-905; AG Ex. 4.0, pp. 10-11, ll. 207-236), the unnamed and unknown drafters of the discovery responses in the Pennsylvania proceeding (AG Ex. 2.0 CONFIDENTIAL, p. 52, ll. 1240-43, pp. 53-54, ll. 1264-1283; AG Ex. 2.3, pp. 39-42; AG Exhibit 4.0, pp. 20-23, ll. 454-527) and the unnamed and unknown parties allegedly proposing and agreeing to the alleged tax-related adjustments generically referenced throughout Mr. Smith's testimony (AG Exhibit 2.0 CONFIDENTIAL, pp. 93-95, ll. 2133-2179; AG Ex. 4.0, p. 27-29, ll. 622-625 & ll. 628-669, p. 43, ll. 966-978, p. 44, ll. 987-991, p. 47, ll. 1051-1059) are not parties to this case. They are not available for cross-examination by IAWC. Notably, the Commission rules permit only the parties to a case to submit testimony. *See* 83 Ill. Adm. Code 200.660. It is improper and unfair to allow the AG to circumvent that rule by introducing, through the testimony of Mr. Smith, the testimony of nonparties from other extra-jurisdictional proceedings.[2]

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[2] A large portion of Mr. Smith's "rebuttal" testimony is a restatement—in parts verbatim—of his direct testimony. *See, e.g.,* AG Ex. 2.0 CONFIDENTIAL, pp. 53-54, ll. 1267-1283 (PUBLIC pp. 52-53, ll. 1259-1275) and AG Ex. 4.0, pp. 20-21, ll. 476-495 (regarding Pennsylvania proceeding); AG Ex. 2.0 CONFIDENTIAL, p. 50, ll. 1191-1199 (PUBLIC p. 49, ll. 1183-1191) and AG. Ex. 4.0, p. 17, ll. 390-399 (regarding CWC); AG Ex. 2.0 CONFIDENTIAL, pp. 56-57, ll. 1333-1349 (PUBLIC p. 56, ll. 1325-1341) and AG Ex. 4.0, p. 25, ll. 566-582 (regarding pension asset); AG Ex. 2.0 CONFIDENTIAL, p. 68, ll. 1578-1589 (PUBLIC pp. 67-68, ll. 1570-1581) and AG Ex. 4.0, p. 33, ll. 740-751 (regarding management audit expense); AG Ex. 2.0 CONFIDENTIAL, p. 69, ll. 1594-1602 (PUBLIC pp. 68-69, ll. 1586-1594) and AG Ex. 4.0, p. 13, ll. 282-289 (regarding UPIS); AG Ex. 2.0 CONFIDENTIAL, pp. 86-87, ll. 1983-2000 (PUBLIC p. 86, ll. 1975-1992) and AG Ex. 4.0, pp. 38-39, ll. 861-875 (regarding bonus tax depreciation); AG Ex. 2.0 CONFIDENTIAL, p. 89, ll. 2047-2058 (PUBLIC p. 87, ll. 2039-2050) and AG Ex. 4.0, p. 39, ll. 883-894 (same); AG Ex. 2.0 CONFIDENTIAL, pp. 89-90, ll. 2060-2077 (PUBLIC pp. 89-90, ll. 2052-2069) and AG Ex. 4.0, pp. 40-41, ll. 905-921 (same); AG Ex. 2.0 CONFIDENTIAL, pp. 96-97, ll. 2205-2214 (PUBLIC p. 96, 2197-2206) and AG Ex. 4.0, pp. 48-49, ll. 1081-1090 (regarding management audit). These portions of Mr. Smith's rebuttal testimony are also improper and subject to exclusion from the record. *See Citizens Util. Co. of Ill.*, Docket No. 84-0237, 1985 Ill. PUC LEXIS 38, **42-52 (1985) (finding the proper scope of rebuttal testimony is determined by long-established Commission practice, which follows Illinois law*); Rodriguez v. City of Chicago*, 21 Ill. App. 3d 623, 625–26 (1st Dist. 1974) (under Illinois law, rebuttal evidence must answer or respond to new affirmative matters raised by an adversary).

In sum, Mr. Smith has offered no basis to conclude the out-of-proceeding declarations he includes in his testimony are reliable. They are not. They should be stricken from the evidentiary record here.

III. CONCLUSION

For reasons discussed herein, the portions of Mr. Smith's testimony identified on pages 1-2 of this motion and in the appendices hereto should be stricken.

Dated: May 7, 2012

Respectfully submitted,

Illinois-American Water Company

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CERTIFICATE OF SERVICE

I, Anne M. Zehr, certify that on May 7, 2012, I caused a copy of the foregoing Illinois-American Water Company's Motion to Strike Portions of the Testimony Of Ralph C. Smith to be served by electronic mail to the individuals on the Commission's Service List for Docket No. 11-0767.

/s/ Anne M. Zehr
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